JD-21-11
Claymont, DE

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

TUBE CITY IMS, LLC[1] Case No. 4-CA-37596

and

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 542, AFL-CIO

David Faye, Esq., for the General Counsel.
Michael E. Lignowski and Julie Sturniolo, Esqs., (Morgan, Lewis & Bockius, LLP, Philadelphia, Pennsylvania) for the Respondent.
Frank Bankard, Fort Washington, Pennsylvania, for the Charging Party.

DECISION

Statement of the Case

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Philadelphia, Pennsylvania on January 31, and February 1, 2011. The Charging Party Union, International Union of Operating Engineers, Local 542, filed the charge in this matter on July 27, 2010. The General Counsel issued the complaint on October 27, 2010.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs[2] filed by the General Counsel, Respondent and the Charging Party,[3] I make the following

[1] The case caption has been amended to reflect the correct name of the Respondent.
[2] The General Counsel in an attachment to his brief has moved to correct a number of transcription and typographical errors in the transcript. I have reviewed the corrections, none of which appear to be critical to the outcome of this case. The corrections appear to be accurate and thus I grant the motion.
[3] The Charging Party's brief references matters that are not evidence of record. I have not given any consideration to such matters.

FINDINGS OF FACT

I. JURISDICTION

Respondent conducts business in several states including at a steel mill in Claymont, Delaware, where it provides heavy equipment and employees to operate and maintain this equipment as a contractor for Ervaz Steel.[4] Respondent purchases and receives goods at this facility which are valued in excess of $50,000 directly from points outside of Delaware. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Charging Party Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The legal framework

This is what is commonly referred to as a salting case. The General Counsel alleges that Respondent has refused to consider Frank Bankard for employment, or hire him for open positions for which he was and is qualified. The General Counsel further alleges that Respondent did so because Bankard is a full-time union organizer, who announced his intention to promote unionization of Respondent's employees and to discourage its employees from seeking union representation in violation of Section 8(a)(3) and (1) of the Act.

There are a number of cases under the Act that apply to salting cases and thus establish the framework for considering the facts of this case. The most important of these cases are:

NLRB v. Town & Country Electric, Inc., in which the Supreme Court, noting the considerable deference accorded to the Board's interpretation of the Act, affirmed that the Board could lawfully construe the Act's definition of "employee" to include paid union organizers. 516 U.S. 85, 94–95, 98 (1995).

FES, 331 NLRB 9 (2000), supplemented 333 NLRB 66 (2001), enfd. 301 F.3d 83 (3d Cir. 2002). In *FES,* Board held that:

> To establish a discriminatory refusal to hire, the General Counsel must, under the allocation of burdens set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), first show the following at the hearing on the merits: (1) that the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicants had

[4] Ervaz is a large international company doing business in many countries including the U.S., Canada, Russia and the Ukraine.

> experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that antiunion animus contributed to the decision not to hire the applicants. Once this is established, the burden will shift to the respondent to show that it would not have hired the applicants even in the absence of their union activity or affiliation.

The FES framework was modified by the Board in *Toering Electric Co.,* 351 NLRB 225, 232-34 (2007). The Board found that in salting cases, the General Counsel bears the ultimate burden of proving the applicant's genuine interest in employment. This burden has two components: 1) that there was an application for employment; and 2) that if the employer contests the applicant's actual interest employment, the General Counsel must prove by a preponderance of the evidence that that the applicant was genuinely seeking to establish an employment relationship with the employer.

Another case which is not directly applicable to the proceeding on the merits before me, but which obviously has great bearing on the litigation posture of this is case is *Oil Capitol and Sheet Metal*, 349 NLRB 1348 (2007). In that case the Board held that the General Counsel, as part of his existing burden of proving a reasonable gross backpay amount due, must present affirmative evidence that the salt/discriminatee, if hired, would have worked for the employer for the backpay period claimed in the General Counsel's compliance specification.

Factual Conclusions

Frank Bankard is a full-time organizer for the Union. A substantial part of his responsibilities in this position is to obtain employment with non-union companies and to attempt to organize them during his non-work time. Bankard is a certified welder, a certified crane operator and is certified to operate forklifts and other type of construction equipment. He also has a CDL driver's license with a tanker endorsement.

In the past several years Bankard has worked in his trade for both union and non-union companies. When working for the latter, he receives his full salary from the union as an organizer. Since 2007 Bankard had worked for three non-union employers. Bankard worked for a company named Pirtek for nine months and resigned when Pirtek signed a collective bargaining agreement. He worked for Harrah's, building a racetrack for seven months and resigned after an NLRB election. Bankard worked two weeks for J.F. Shay Company in 2010 and resigned when Shay signed a collective bargaining agreement. Since October 27, 2010, when he was interviewed by Respondent, Bankard has applied for work at several other non-union employers.

On January 30, 2010, Bankard saw a job advertisement on a website named Indeed.com for a mechanic's position at Respondent's Claymont, Delaware facility. He went to the jobsite, obtained an application, filled it out and submitted it along with his

résumé through the Indeed website. Respondent concedes that it received Bankard's résumé in February 2010, Tr. 239. It also concedes that it contacted Bankard to determine whether he was interested in employment. The date of this contact and what was said is disputed.

On February 1, Bankard saw the advertisement on the website again and submitted a résumé under the alias of "Joe Banco." The résumé submitted under the Banco alias demonstrated less qualifications for these positions than Bankard possessed and which he noted in the résumé submitted under his real name. For example, while Bankard's résumé indicated that he was a certified welder, had a certified crane operator's license and had a CDL driver's license; Banco's résumé listed none of these qualifications.

On February 2, Thomas Zaremba, Respondent's site superintendent for metal recovery operations at Claymont, called "Joe Banco." On February 18, 2010, Zaremba, George Post, General Manager of Operations, who is Zaremba's supervisor and is based in Ohio, and David Pawelczyk, a lead operations manager for Respondent, also based in Ohio, interviewed "Banco."[5] Post told "Banco" that Respondent was in desperate need of mechanics. Post gave "Banco" an application and told him to fill it out.

I credit Bankard's testimony regarding statements made to him by Post on February 18. Post in very general terms purported to contradict Bankard's testimony in response to leading questions from his counsel, Tr. 306-07. However, while Post denied having ever heard of Frank Bankard or participating in any employment related decisions with respect to Bankard, he gave no such testimony regarding "Joe Banco." Post's failure to specifically address the testimony of Bankard regarding the "Banco" interview leads me to credit all of Bankard's testimony regarding his interaction with Post. Thus, I credit Bankard's testimony that Post told "Banco" that Respondent is a non-union company and that no union is allowed on the Claymont jobsite, Tr. 34.

The next day, February 19, Zaremba called "Banco" and offered him a job at $22 per hour. He told "Banco" that he could drop off his employment application later and said that Respondent would have to schedule "Banco" for a drug test.

"Banco" faxed his application to Respondent on February 19. On February 23, Respondent called "Banco" and scheduled him for a drug test on February 26, 2010. "Banco" did not show up for the drug test. On February 27, Zaremba called "Banco" and left a message that if he was still interested in the job, Respondent would reschedule the drug test. "Banco" called back and informed Zaremba that he was no longer interested in employment with Respondent.

[5] Thomas Zaremba acknowledged that Respondent interviewed "Banco," Tr. 237. He did not contradict Bankard's testimony concerning Respondent's interview and job offer to "Banco" in any way. I therefore credit Bankard's testimony regarding "Banco's" interaction with Respondent.
To gain entry to the Claymont site, Bankard identified himself as "Joe Banco" at the security gate.

On March 3, Bankard saw another advertisement placed by Respondent for Heavy Equipment Operators and Mechanics. He called Respondent and spoke with Teresa Campbell, Respondent's receptionist and site clerk at the Claymont facility. Campbell told Bankard that another applicant had backed out of a job offer. Bankard told Campbell that he had sent résumés to Respondent via the Internet on January 30 and February 19, and had received no response. Bankard faxed another résumé to Campbell on March 3.[6] Campbell told Bankard that she would give it the proper person.

On March 11, Bankard saw an advertisement for heavy equipment operators and mechanics on Respondent's own website. That day Respondent had terminated William Richardville, a welder that it had hired only 6 days previously, G.C. Exhs.. 21 and 22. Bankard submitted an application to Respondent in response to this advertisement with the information from his résumé pasted into the appropriate boxes. This information was garbled by the pasting and was thus difficult to read. Bankard received an automated response to his application on March 11, G.C. 12. That response states:

> In the event that we do not contact you, we will retain your résumé in our files for one year.

I find that Thomas Zaremba's testimony, that in early to mid 2010 that, as a matter of standard practice, he discarded the applications of job applicants that he did not hire, to be false. Not only would such a practice be inconsistent with the plain language of the application, the General Counsel, when cross examining Zaremba introduced a number of applications of individuals who were not hired in late 2010 and whose applications Respondent retained, including a person who was about to be hired but did not pass a background check, G.C. Exh. 51.[7]

On March 12, Respondent's Assistant Supervisor for Metal Recovery at Claymont, Ralph "Skip" Levenite, called Bankard. Levenite told Bankard that Respondent needed a mechanic and discussed his work history. Then Levenite asked if Bankard was working. When Bankard told him that he was currently working for the Union, Levenite asked him if he knew that Respondent was a non-union company. Bankard told Levenite that he did know that and that he was an organizer for the Union. Levenite told Bankard to call him on Monday, March 15. When he did so, Levenite told Bankard that the positions of mechanic and heavy equipment operator had been filled.

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[6] Respondent stipulated that Teresa Campbell was at all material times an agent of Respondent, Tr. 126. This is consistent with Board precedent, *Cossentino Contracting Co.,* 351 NLRB 495 at n. 2, 499-500 (2007). She did not testify in this proceeding and therefore all of Bankard's testimony regarding his interaction with Campbell is uncontradicted and credited. Moreover, since Campbell is still an employee of Respondent, Tr. 126, I draw an adverse inference that had Respondent called Campbell to testify that her testimony would have been harmful to Respondent's case.

[7] Although I am not a great believer in demeanor evidence, Zaremba's demeanor when confronted with these applications indicated that he was aware that his prior testimony had been shown to be false. At Tr. 285, Respondent's counsel led Zaremba to testify on redirect examination that he after he learned of the unfair labor practice charge in this case, he changed his practice with regard to the retention of applications of individuals who were not hired. In part, I discredit this testimony because Zaremba was led to so testify and because he failed to so testify when testifying on direct examination.

Credibility Resolution regarding the testimony of Frank Bankard and "Skip" Levenite regarding their telephone conversations

I credit Bankard's testimony that Levenite called him on March 12, and not as Levenite claims on February 17. Levenite's testimony is highly implausible. First of all, it is extremely unlikely that Bankard would tell him he was not interested in a position for which he had already applied and applied for several times afterwards. Secondly, such a statement by Bankard would also be contrary to his work record with other non-union companies. Thirdly, Levenite's testimony at Tr. 292-93, that he told Bankard that Respondent would be back in touch with him if it was interested in hiring him as an organizer, is nonsensical. Fourth, if Bankard made the statements attributed to him by Levenite, I would expect that Zaremba would have raised this when he interviewed Bankard on October 27, 2010. The fact that he did not, indicates that Bankard never told Levenite that he was not interested in the mechanic welder job.

The sequence of events concerning Bankard's applications also makes it far more likely that he talked to Levenite on March 12 than on February 17. Bankard submitted an application to Respondent through Indeed.com on January 30. There is no evidence that he submitted another application under his real name until February 19. Thus, there is no coherent explanation as to why Zaremba would have asked Levenite to call Bankard on February 16, or why Levenite would have called Bankard on February 17. There was, however, a good rationale for Levenite to call Bankard on March 12. On the previous day, Bankard had submitted an application directly to Respondent and due to the garbled nature of the information on the application it was apparent that Bankard had the skills that Respondent was seeking for a mechanic/welder but it was not so apparent that Bankard was a union organizer.[8]

Bankard's efforts to gain employment with Respondent after he spoke to Levenite

Bankard spoke with Teresa Campbell on March 19. He asked her whether Respondent was still looking for mechanics. Campbell replied that she believed so. Bankard then told Campbell that he had sent in a résumé on several occasions. Campbell told Bankard that she would give his résumé to the proper person. He did not hear back from Respondent. He had almost identical conversations with Campbell on April 20 and May 18. In June 9, Bankard applied again for a heavy equipment operator position for which Respondent had been advertising since March 2010. He received another

[8] G.C. Exh. 12 corroborates Bankard's testimony at least in so far as he testified that sent a job application to Respondent on March 11.

Respondent argues that I should discredit Bankard because Judge George Aleman discredited some of his testimony in *Brubacher Excavating,* 4-CA-32437 (Judges Decision February 28, 2005). While Judge Aleman credited the employer's testimony over that of Bankard in some respects, he credited Bankard in other respects and found that Brubacher refused to hire him discriminatorily, *ibid, slip opinion pages 7, 11, 17, 21*. Judge Aleman's decision and the Region 4 decision in *Mid Atlantic Hose Center, LLC d/b/a Pirtek Case* 4-RC-21390 in fact provide corroboration for the material aspects of Bankard's testimony regarding his work history.

automated confirmation stating again that his résumé would be retained for one year. Bankard received no other response from Tube City. On June 30, Respondent rehired Steven Touchstone as a crane operator. Touchstone applied for this job on June 21, G.C. Exh. 35. On August 2, Bankard saw an advertisement for the same position at Claymont as a heavy equipment mechanic that had been posted since January.

In September 2010, John Carroll, Respondent's Senior Vice-President of Human Resources called Bankard to set up an employment interview. Carroll did this after being advised by NLRB Agent Joseph Cionzynski that Region 4 would issue or was likely to issue a complaint against Respondent based on the unfair labor practice charge the Union filed on July 27. Bankard faxed Carroll his résumé on September 28, R. Exh. 2.

Tom Zaremba, John Lacy, superintendent for surface conditioning, and maintenance foreman Steve Vignola interviewed Bankard on October 27, 2010. The next day Zaremba, who has authority to hire employees without consulting John Carroll, forwarded a memorandum to Carroll concerning the interview. Zaremba has not done this with any other applicant, one of many reasons that lead me to conclude that Respondent had decided not to hire Bankard before the October 27 interview.

In this regard, General Counsel's Exhibits 21 and 22 contain the names of 16 employees hired by Respondent at Claymont since January 4, 2010. All were hired by Zaremba without consultation with Carroll or any other higher official. I infer Zaremba was instructed to report to Carroll regarding the interview in order to give Respondent an opportunity to find a pretextual reason for declining to hire Bankard. As explained below, there are other reasons on which I base my conclusion that the reasons Respondent gives for not hiring Bankard are pretextual.

One the reasons Respondent gives for not hiring Bankard after the October 27 interview is that on the last page, Bankard crossed out the words "or without" from the following sentence: "the Employer reserves the right to terminate my employment at any time, with or without cause…" This is no evidence that Respondent used an application form with this language prior to October 6, 2010.

Thus there is no evidence that Respondent used this form until Carroll has spoken to the Board Agent and Bankard about setting up an interview. Respondent began using the new form about a week after receiving Bankard's résumé pursuant to these discussions. Prior to October 6, all the application forms in this record state that "International Mill Service follows an "employment at will" policy, in that I or IMS may terminate my employment at any time, or for any reason consistent with applicable state or federal law…,", e.g. G.C. Exh. 51. There is no explanation for why the language in the form was changed and given this fact and the timing of the implementation of the new form with the new language, I infer that its use was implemented in part to facilitate refusing to hire Bankard or other union supporters.

Respondent offered "Joe Banco" employment in February 2010 before he completed a job application, thus indicating that the importance given to the specific

language of the employment application is pretextual. Finally, Respondent has not established when Zaremba noticed the cross-outs. Barring discriminatory motive, there is no evidence that Zaremba would not have hired Bankard on October 27. No representative of Respondent asked Bankard about the cross-outs at any time. This is another indication that Respondent's reliance on the cross-outs is a post-hoc rationalization for its discriminatory decision not to consider Bankard for hire or to hire him.

That Respondent's reliance on Bankard's cross-out is pretextual is also indicated by the fact that on October 21, 2010, 6 days before Bankard filled out the new form, William Hill applied on the old form, G.C. Exh. 50. Respondent was considering hiring Jason Rudder on the basis on the old form as late as November 1, 2010, but did not do so, G.C. Exh. 51, Bates # 292. Thus, failure to accept Respondent's right to terminate "without cause" did not automatically disqualify an applicant from employment with Tube City.

Respondent's hiring of employees for the positions for which Frank Bankard applied

After offering a job to "Joe Banco" in February 2010, Respondent did not hire any heavy equipment operators or mechanics until March 5, when it hired welder William Richardville, G.C. Exhs. 21 and 22. Respondent terminated Richardville a week later and may have replaced him with transfers from other facilities. On April 24, 2010 Tube City IMS rehired mechanic Joshua Stallard. Stallard did not apply for this job until April 8, 2010, G.C. Exh. 34. Tube City also hired Kevin Milligan as a mechanic on May 24 (Tr. 183, line 7 should read "hired," rather than "retired", see G.C. Exhs. 21, 22 and 28). Respondent transferred several employees from an Ohio facility to perform maintenance at Claymont for as much as five months in early 2010, Tr. 149. These employees were members of another local union of the Operating Engineers.

In January 2011, Respondent was still advertising for heavy equipment operators and mechanics at Claymont. On January 7, 2011, Tube City hired Eric Leapart to be a "slab hauler" at $16.50 per hour, which is $4 more than Respondent's entry wage for unskilled labor.

Analysis

The General Counsel satisfied his initial burden pursuant to *FES* of showing that Respondent discriminatorily refused to hire Frank Bankard. He established that Respondent was hiring employees at the time Bankard applied for mechanic and heavy equipment positions with it. The General Counsel also established that Bankard had experience and training relevant to the generally known and announced requirements of the mechanic and equipment operator positions which it subsequently filled with applicants who did not have any union affiliation. Finally, the General Counsel established that anti-union animus contributed to the decision not to hire Bankard. This is established, for example, by Respondent's offer of employment to "Joe Banco" and other applicants who had, so far as this record shows, no union affiliation and Zaremba's

unprecedented consultation with John Carroll after interviewing Bankard in October 2010. George Post's comments to Bankard during the "Joe Banco" interview in February 2010 also establish that Respondent's failure to consider Bankard for hire or to offer him employment were due to Respondent's anti-union animus.

I also conclude that the General Counsel met his burden under *Toering Electric.* There is no question that Bankard submitted numerous applications for employment. Bankard's work record prior to applying for a position as a mechanic/welder or operator with Respondent was not challenged or contradicted by Respondent.[9] This work record indicates a genuine interest in establishing a work relationship with Tube City as a mechanic/welder or operator.

Moreover, I have discredited the testimony of Ralph Levenite. Thus, I find that Respondent did not create a reasonable question as to Bankard's actual interest in going to work for Respondent as a mechanic/welder or operator. Similarly, as discussed more fully elsewhere in this decision, Bankard's crossing out of a few words on Respondent's new employment application on October 27, 2010 fails to create such a reasonable question—particularly in light of Respondent's failure to mention this to him as a concern.[10]

Thus, the burden is shifted to Respondent that it would not have hired Bankard even in the absence of the fact that he is a union organizer. Respondent has not met its burden in this regard. All the reasons it advances are pretext and as such merely strengthen the General Counsel's case that Respondent's refusal to hire Bankard was discriminatory, As noted by the Court of Appeals for the Ninth Circuit in *Shattuck Denn Mining Corp. v. NLRB*, 366 F.2d 466, 470 (9th Cir. 1966):

> Actual motive, a state of mind, being the question, it is seldom that direct evidence will be available that is not also self-serving. In such cases, the self-serving declaration is not conclusive; the trier of fact may infer motive from the total circumstances proved. Otherwise no person accused of unlawful motive who took the stand and testified to lawful motive could be brought to book. Nor is the trier of fact-here a trial examiner-required to be any more naïf than is a judge. If he finds that the stated motive for a discharge is false, he certainly can

9 In its brief, Respondent points out a number of inconsistencies in the résumés submitted by Bankard. I regard these as immaterial. Respondent has not rebutted Bankard's testimony that he worked for substantial periods for union and non-union contractors. It subpoenaed his W-2 forms. At hearing there was some confusion or dispute as to whether Bankard ever produced these forms. However, since Respondent has not claimed that Bankard failed to produce these forms since the discussion at Tr. 93, 95 and 119, I conclude that it was satisfied that he worked for these contractors as he testified. Indeed, Respondent's brief at page 27, suggests as much.

10 Respondent also argues at pages 15-16 of its brief, that Bankard's failure to accept the offer of employment to "Joe Banco" demonstrates that Bankard lacked a genuine interest in employment with Respondent. I reject this argument. For one thing, had Bankard accepted this offer he almost certainly would have been required to fill out a Federal tax withholding form, W-4, which he would have had to fill out accurately upon pain of perjury. Thus, his failure to accept the offer to "Joe Banco" is irrelevant to the issue of whether he would have accepted an offer of employment as Frank Bankard.

> infer that there is another motive. More than that, he can infer that the motive is one that the employer desires to conceal-an unlawful motive-at least where, as in this case, the surrounding facts tend to reinforce that inference.

Accord, Fast Food Merchandisers, 291 NLRB 897, 898 (1988), *Fluor Daniel, Inc.,* 304 NLRB 970, 971 (1991).

I conclude that Respondent's reliance on Bankard's cross-outs on his job application is pretextual for a variety of reasons which I have explained previously.

Respondent's reliance on Bankard's application as "Joe Banco."

Respondent's reliance on the fact that Bankard also applied to it for employment under the alias Joe Banco with fictitious information also fails to meet its burden under *FES*. Indeed, it has no relevance as to whether Respondent violated the Act.[11]

First of all, Respondent was not aware that Bankard was "Joe Banco" until this hearing began on January 31, 2011. By this time it had been discriminatorily refusing to consider Bankard for hire and refusing to hire him for almost a year. At best (or worst), Bankard's application as "Joe Banco" would negate Bankard's entitlement to instatement and extinguish Respondent's backpay liability on January 31, 2011.

However, Bankard's activities as "Joe Banco" do not negate the appropriateness of ordering an instatement and complete back-pay remedy. In *Hartman Brothers Heating & Air Conditioning v. NLRB,* 280 F. 3d1110 (7th Cir. 2002), the Court held that a union salt is not disqualified from employment or back pay on account of the salt lying about his status as a salt, organizer or union supporter, as opposed to his qualifications for the job. Bankard, as Bankard, did not lie about his qualifications for Respondent's jobs. By analogy, I conclude that a union salt is not disqualified from employment or the Board's traditional remedies by lying or seeking employment under an alias in order to prove an employer's discriminatory motive in not offering employment to him or her under his true identity., See *OPW Fueling Components,* 343 NLRB1034, 1036-37 (2004); *Ogihara America Corp.,* 347 NLRB 110, 113 n. 11 (2006).[12]

Conclusion of Law

Respondent violated Section 8(a)(3) and (1) by refusing to consider Frank Bankard for employment and refusing to hire Frank Bankard since January 30, 2010.

[11] No different result follows from the fact that Bankard identified himself as "Joe Banco" at the security gate at the Claymont site on February 18, 2010.

[12] The practical effect of the "Joe Banco" alias is that it establishes that Respondent was hiring as early as February 2010. In the absence of the offer of employment to "Banco," the record shows that Respondent hired the first employee for a position for which Bankard applied on March 5, 2010.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily refused to hire Frank Bankard, it must make him whole for any loss of earnings and other benefits, consistent with the Board's decision in *Oil Capitol and Sheet Metal*, 349 NLRB 1348 (2007), computed on a quarterly basis since January 30, 2010, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest compounded daily, *Kentucky River Medical Center,* 356 NLRB No. 8 (October 22, 2010) as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[13]

ORDER

The Respondent, Tube City, IMS, LLC, Claymont, Delaware, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to consider for employment or refusing to hire any job applicant because the applicant is a union organizer or seeks union representation.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days of the Board's Order, offer immediate employment to Frank Bankard in the positions for which he applied, or, if such positions no longer exist, to substantially equivalent positions.

(b) Make Frank Bankard whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the Board's decision.

[13] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) Within 14 days of the Board's Order, remove from Respondent's files any reference to the unlawful refusal to hire Frank Bankard and within 3 days thereafter, notify him in writing that this has been done and that the refusal to hire him will not be used against him.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Claymont, Delaware facility copies of the attached notice marked "Appendix."[14] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 30, 2010.

In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., April 5, 2011.

_____
Arthur J. Amchan
Administrative Law Judge

[14] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT refuse to consider for hire or refuse to hire any job applicant because we believe that they intend to try to organize our employees or because they seek union representation by any labor organization including Local 542 of the International Union of Operating Engineers.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days of the Board's Order, offer immediate employment to Frank Bankard in the positions for which he applied, or, if such positions no longer exist, to substantially equivalent positions.

WE WILL make Frank Bankard whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the Board's decision.

WE WILL, within 14 days of the Board's Order, remove from our files any reference to the unlawful refusal to hire Frank Bankard and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the refusal to hire him will not be used against him.

TUBE CITY IMS, LLC

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

615 Chestnut Street, 7th Floor, Philadelphia, PA 19106-4404

(215) 597-7601, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (215) 597-5354.